Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-24-33 OF 1998
RAUS SHARIF J
11 DECEMBER 2003

Revenue Law — Stamp duty — Assessment — Payment made by co-operative society despite being exempted — Whether onus on party to prove exemption — Application for refund refused — Limitation — Delay in forwarding claim — Whether a bar to seek refund — Stamp Act 1949 ss 57, 58, para 5 of General Exemptions of First Schedule

The plaintiff, a co-operative society, had paid the stamp duty as requested by the defendant in relation to the purchase of property. About two years later, the plaintiff discovered that it was exempted from making the said payment and sought a refund. Relying on s 57 of the Stamp Act ('the Act'), the defendant refused the plaintiff's claim.

The plaintiff applied to this court, inter alia, for the refund.

Held, dismissing the application:

(1) The defendant was wrong to rely on s 57 of the Act for not refunding the duty to the plaintiff as that section refers to spoiled stamps. In the present case, the instrument is a transfer from which duty has been paid and therefore was not applicable (see para 6).

(2) The plaintiff has the duty to apply for the exemption and to provide proof that it comes within para 5 of the General Exemption of the First Schedule as there is no automatic exemption on all instruments executed by a co-operative society. The plaintiff had failed to do so and the defendant cannot be faulted for imposing the stamp duty (see paras 9 and 10).

(3) The plaintiff was not entitled to the refund because of the provisions on time limitation for repayment of the stamp duty as specified by s 58 of the Act, which was within 12 months after the date of the instrument. Here, the plaintiff paid the stamp duty on 10 October 1995 and the application for repayment was made on 6 August 1997 and clearly it had surpassed the time limit (see paras 11 and 12).

[Bahasa Malaysia summary

Pihak plaintif, sebuah pertubuhan koperatif, telah membayar duti setem seperti yang dikehendaki oleh defendan berkenaan dengan pembelian hartanah. Dua tahun kemudiannya, plaintif telah mendapati bahawa ia dikecualikan daripada membuat bayaran tersebut dan memohon untuk pembayaran baliknya. Beralaskan s 57 Akta Setem ('Akta tersebut'), defendan telah menolak permohonan plaintif.

Plaintif memohon ke mahkamah ini, antara lain, untuk pengembalian semula bayaran tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Defendan khilaf dengan merujuk kepada s 57 Akta tersebut dalam menolak pembayaran balik duti kepada plaintif kerana seksyen tersebut merujuk kepada setem rosak. Dalam kes semasa, instrumen berkenaan adalah penukaran daripada mana duti telah dibayar dan dengan itu tidak terpakai (lihat perenggan 6).

(2) Plainyif mempunyai kewajipan untuk memohon pengecualian dan memberi bukti bahawa ia termasuk di bawah para 5 Pengecualian Am First Schedule kerana tidak ada pengecualian otomatik ke atas kesemua instrumen yang disempurnakan oleh suatu pertubuhan koperatif. Plaintif gagal berbuat begitu dan defendan tidak boleh dipersalahkan kerana mengenakan duti setem (lihat perenggan 9 dan 10).

(3) Plaintif tidak berhak untuk pembayaran balik kerana peruntukan untuk had masa pembayaran semula duti setem seperti yang dinyatakan oleh s 58 Akta tersebut, adalah dalam masa 12 bulan selepas tarikh instrumen tersebut. Di sini, plaintif telah membayar duti setem pada 10 Oktober 1995 dan permohonan untuk pembayaran semula dibuat pada 6 Ogos 1997 dan nyata sekali ia telah melepasi had masa yang ditetapkan (lihat perenggan 11 dan 12).]

Notes

For cases on assessment of stamp duty, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2408–2410

Legislation referred to

Stamp Act 1949 s 35, 36, 57, 57, 57(c), 57(d), 57(f), 58, Sch 1 para 5

D Kalaimany (Kalai & Partners) for the plaintiff
Juliana Ismail (Lembaga Hasil Dalam Negeri) for the defendant

Raus Sharif J:

Application

[1] This is an application by the plaintiff by way of originating summons for the following orders:

(a) a declaration that the levy of stamp duty in the sum of RM30,000 against the plaintiff vide the defendant's letter dated 8 September 1995 is ultra vires s 35 First Schedule, 5 of the Stamp Act 1949 and is null and void and of no effect;

(b) an order directing the defendant to restitute to the plaintiff a sum of RM30,000;

(c) an order directing the defendant to pay the plaintiff interest at the rate of 8% per annum on the sum of RM30,000 from 9 September 1997 to the date of full realisation; and

(d) costs.

Facts

[2] The brief facts leading to this application are as follows:

[3] The plaintiff is a co-operative society incorporated under the Co-operative Society Act 1993. By a sale and purchase agreement dated 24 May 1995, the plaintiff purchased a property therein described for a total purchase price of RM1.2 million. The plaintiff's solicitors submitted the appropriate forms to the defendant for the adjudication as to the proper stamp duty under s 35 of the Stamp Act 1949 ('the Act'). The defendant, acting under s 36 of the Act, assessed the stamp duty payable on transfer of the property to be a sum of RM30,000. The plaintiff, on 10 October 1995, paid the said sum of RM30,000.

[4] On 6 August 1997, approximately two years later, the plaintiffs discovered that under s 35 (General Exemption) First Schedule, 5 of the Act, the plaintiff being a co-operative is exempted from paying any stamp duty and sought a refund of the same. By a letter dated 9 October 1997 the defendant rejected the claim on the ground that:

> uratcara tuan disempurnakan pada 1995. Sebaliknya permohonan tuan dibuat pada 6th Ogos, 1997.
>
> Seksyen 57 tersebut di atas diperuntukkan:
>
> … the application for relief is made within twelve months after the stamp has been spoiled or become useless in the case of an executed instrument after the date of the instrument … .

Findings

[5] I have no hesitation to find that the defendant was wrong to rely on s 57 for not refunding the duty to the plaintiff. To me, s 57 refers to spoiled stamps. The heading reads 'Allowance for spoiled stamps'. Section 57(a) refers to stamps on any paper. So does subsection 57(b). Section 57(c) refers to bills of exchange while s 57(d) refers to promissory notes and s 57(f) refers to:

(i) instruments which are found to be void from the beginning;

(ii) instruments subsequently found unfit by reason of error or mistake;

(iii) instruments which are incomplete or not registered within time which fail for the purpose or become void;

(iv) instruments which are inadvertently and unsigned spoiled and in lieu whereof another instrument is made and for the same purpose is executed and duly stamped or which become useless because the transaction is affected by some other instrument duly stamped.

[6] The proviso to s 57 allows for relief if an application for the same is made within 12 months after the stamp becomes spoilt, useless or, if in case of an executed instrument, after the date of the instrument. However, the instrument in our present case, is a transfer from which duty has been paid. Clearly s 57 of the Act does not apply to the plaintiff's application.

[7] Thus, the next issue is whether or not the plaintiff is entitled to the refund of the paid stamp duty. The plaintiff is relying on the ground that the plaintiff is exempted from any stamp duty on the transfer of the said property by virtue of s 35 of the Act which reads as follows:

> 35. Exemptions.
>
> The instruments appearing under the heading of 'General Exemptions' in the First Schedule shall not be chargeable with duty.

[8] Paragraph 5 of the General Exemptions of the First Schedule provides inter alia:

> 5. All instruments relating solely to the business of any society registered under any written law relating to co-operative societies and executed by an officer or member of such society, the duty on which, but for the exemption hereby granted, be payable by such officer or member.

[9] To me, the above provision does not confer automatic exemption on all instruments executed by a cooperative society. It is the duty of the plaintiff when submitting the appropriate form to the defendant for the adjudication of the proper stamp duty under the Act, to seek an exemption by showing:

(a) the instruments relate solely to the business of any society;

(b) the society was registered under any written law relating to cooperative societies; and

(c) the instruments were executed by the officer or member of such society.

[10] It is clear in this case that the plaintiff failed to bring to the attention of the defendant that it was in fact exempted by paragraph 5 of the General Exemption of the First Schedule. No doubt that the plaintiff's application was accompanied by one copy of the transfer Form 14A, 5 sets of the stamping performa forms and the sale and purchase agreement, but I am of the view that it is still the duty of the plaintiff to apply for the exemption and to provide proof that it comes within paragraph 5 of the General Exemption of the First Schedule. The plaintiff had failed to do so and the defendant cannot be faulted for imposing the stamp duty.

[11] Furthermore, I am of the view that the plaintiff is not entitled to the refund because of the provisions on time limitation for a repayment of the stamp duty as specified by s 58 of the Act. Section 58 provides as follows:

> 58. Allowance for misused stamps.
>
> When any person has inadvertently used for an instrument liable to duty a stamp of greater value than was necessary, or has inadvertently used a stamp for an instrument not liable to any duty, the Collector may, on application made

within twelve months after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed, and upon the instrument, if liable to duty, being stamped with the proper duty cancel and allow as spoiled the stamp so misused.

[12] The said provision does allow an application for repayment of stamp duty where a person has '… inadvertently used a stamp for an instrument not liable to any duty…'. But it must be made within 12 months after the date of the instrument. In our present case, the plaintiff paid the stamp duty of RM30,000 on 10 October 1995 and the application for repayment was made on 6 August 1997. Clearly, it surpassed the time limit as specified by s 58 of the Act.

[13] For the above reason, the plaintiff's application is dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by AG Kalidas